Rigby J., that if the construction previously given is at fault, the Court is under a duty to bring into operation Clause 6 of Article 162. It was mentioned by the Attorney-General in the course of his argument that the modification under Clause 4 of Article 162 by His Majesty in respect of any other provisions of an existing law would preclude the exercise by the Court of its power under Clause 6. The Attorney-General beyond making this submission did not develop the argument, and I am not certain how far he wished that submission to be taken. In my opinion, however, having regard to the wideness of His Majesty's power and the definition of the term, "law", this argument is fallacious. In any case it is purely academic because the time for modification by His Majesty has now expired and at the most it could only be taken as far as a statement that the Courts would have to consider the Constitution as modified by His Majesty at the time of consideration. The Attorney-General then proceeded to deal with the remitting by the trial Judge of the proceedings to the Registrar to take an account and for necessary consequential orders following on that account. It was the submission of the Attorney-General that on the law of the Federation as set out in the Enactments and cases to which he makes reference in his written submissions a judgment cannot be entered against the Government of the Federation. How far those pre-merdeka judgments are affected by the new Constitution is not clear to me but I find it unnecessary in the light of the undertaking twice repeated by the Attorney-General to make a decision thereon. The reason for this will be clear when reference is made to the actual order which I would make on this appeal.

For myself I would grant the appeal to the extent of deleting from the declaration the words, "and still is a member of the force," and substituting the words, "and was at the date of filing of the suit a member of the force".

As regards the remitting to the Registrar, I would order a stay of that part of the order pending a further order of this Court.

In view of the judgments of the majority of the Court I would content myself on the question of costs with saying I see no reason why the successful party should not get his or its costs.

I note that I have not dealt with the so-called cross-appeal. I have not done so because when the question was raised during the hearing by the learned Chief Justice — I am not certain whether counsel for the respondent withdrew or abandoned it — but if it still remains extant, in my opinion, it is not a cross-appeal in that it is not sought on behalf of the respondent to set aside the order or the judgment in the Court below or any part thereof. It is therefore not a proper cross-appeal. It is no more, in my opinion, than respondent's reasons additional to the judgment of Rigby J. to support the actual judgment in the Court below.

Appeal allowed.

Cross-appeal dismissed.

SHELL CO. OF THE FEDERATION OF MALAYA LTD. v. CHAIRMAN, MUNICIPAL COUNCIL

[C.A. (Thomson C.J., Good J.A. and Ismail Khan J.) March 8, 1961]

[K.L. — F.M. Civil Appeal No. 67 of 1960]

Practice and Procedure — Appeal from statutory body — Commencement of — R.S.C., O.59 r.13(1) — Motions — O.52 — Lack of Compliance with O.52 r.4 — Irregularity curable under O.70 — Town Boards Enactment (Cap. 137), s.44.

The appellants were dissatisfied with a decision of the Municipal Council as to the rateable value of their property. They appealed under section 44 of the Town Board Enactment, (Cap. 137) filing in the Registry at Kuala Lumpur a document headed "Notice of Motion" stating that the Court would be moved for an order that the decision of the respondent should be varied on certain specified grounds. The respondent gave notice that they would oppose the motion on the ground that it was not supported by an affidavit as required by O.59 r.13(1) and as such it should be struck out. Hashim J. in the Court below upheld the respondent's contention, and on appeal,

Held: (1) the appellants had satisfied the letter and spirit of the condition laid down in section 44 of the said Enactment by filing a notice setting out the grounds of appeal;

(2) except in cases covered by rule 4 of O.52, affidavits may be filed up to the time of making the motion. A lack of strict compliance with this rule may well be an irregularity capable of being cured under the provisions of O.70 and is not necessarily fatal to the validity of the motion.

(3) O.59 r.13(1) makes it clear that the grounds of appeal must be set out in the motion itself. The affidavit mentioned in this rule which in the discretion of the Court may be supplemented at this hearing by oral evidence is the evidence on which the Court is to be asked to consider the grounds of appeal which have been set out.

Cases referred to:—

(1) *Hampden* v. *Wallis* 26 Ch. D. 746.
(2) *Petty* v. *Daniel* 34 Ch. D. 172.
(3) *Stock* v. *Central Midwives Board* [1915] 3 K.B. 756.
(4) *Allender* v. *Council of the Royal College of Veterinary Surgeons* [1951] 2 All E.R. 859.
(5) *Rembha Bai & Ors.* v. *Jasani* [1960] M.L.J. 306.

COURT OF APPEAL.

A. L. Hills for the appellant.

R. Ramani for the respondent.

Cur. Adv. Vult.

Thomson C.J.: These appellants are the owners of property within the Kuala Lumpur Municipal area who are dissatisfied with a decision of the Municipal Council as to the rateable value of their property. The date of that decision would appear to be 1st July, 1960.

By reason of section 44 of the Town Boards Enactment (Cap. 137) the appellants were entitled to appeal against that decision to the Supreme Court and sub-section (ii) of that section provides that :—

"Every such appeal shall be commenced within fifteen days of the date of the certificate of the Board."

On 13th July, that is within 15 days of 1st July, the appellants filed in the Registry at Kuala Lumpur a document which was headed "Notice of Motion" and which stated that the Court would be moved on 8th August, 1960, for an order that the decision of the Municipal Council of 1st July, 1960, should be varied on certain grounds that were specified.

That notice was issued for service on the respondents on 19th July and on 30th July the respondents gave notice that they would oppose the appellants' motion, which was to be for variation of the original rating order of the Municipal Council, on the ground that it was not supported by an affidavit of facts as required by Order 59 rule 13(1) and that therefore it should be struck out.

On 18th August the appellants filed and caused to be served on the respondents an affidavit setting out at very great length the matters on which they proposed to rely at the hearing of the motion.

The motion came on for hearing before Hashim J. on 29th August and counsel for the respondents at once raised the objection of which they had given notice on 30th July. He submitted that the Notice of Motion which the appellants had filed on 13th July, 1960, should not only have been filed, as it was, within 15 days of the decision of the Town Council but it should also have been accompanied by a supporting affidavit, or at any rate the affidavit should have been filed, as it was not, within 15 days of the Council's decision. In the circumstances the appellants' motion should be struck out.

In the event the learned Judge accepted this submission on the part of the respondents and struck out the appellants' motion. There would appear to be some controversy as to the exact meaning of the formal order in which this decision was later embodied but I think it is very clear that what the Judge did was this. He said to the appellants "I am not going to hear your motion because the supporting affidavit was not filed with the notice and it is struck out."

Against that decision the appellants have now appealed.

As has been said the right of appeal against rating decisions of the Kuala Lumpur Municipal Council is given by section 44 of the Town Boards Enactment which, after requiring as a condition precedent the payment into Court of the amount of the rate appealed against, provides that any such appeal shall be "commenced" within 15 days. The form of such appeals is prescribed by Order 59 rule 13 of the Rules of the Supreme Court, which corresponds and is similar to Order 59 rule 38 of the English Rules. The material portion of the rule provides that the appeal shall be "by motion setting out the grounds of appeal, supported by affidavit and, if the Court so directs at the hearing, by oral evidence".

The procedure regarding motions in general is contained in Order 52. Rule 3 of that Order provides that, subject to certain exceptions with which we are not concerned here, no motion can be made without previous notice to the parties affected thereby, the period of such notice (rule 5) being generally 2 days. Rule 4 which only applies to motions for attachment and certain kinds of motions relating to arbitration awards requires that where the motion is founded on affidavit evidence, a copy of any affidavit to be used must be "served with the notice of motion". This is the only rule requiring service of an affidavit with the motion to which it relates and it is important to observe that it only applies to motions of the type specified in the rule itself which do not include motions of the kind with which we are concerned in the present case. There is no similar provision to be found in the Rules relating to motions in general.

In any event it is to be observed that a lack of strict compliance with rule 4 may well be an irregularity capable of being cured under the provisions of Order 70 and is not necessarily fatal to the validity of a motion. In the case of *Hampden* v. *Wallis*[1] the affidavit was filed and copies supplied some time after service of the notice of motion. Chitty J. said :—

> "In strictness that is not an exact compliance with the provisions of the.....rule, but it is a mere irregularity, and of a trifling character, because copies were served and the party had due notice in time before the motion could come on. It is an irregularity which it is within the discretion of the Court to deal with."

Again, in the case of *Petty* v. *Daniel*[2] where affidavits had not been served with the notice of motion on the defendant's London solicitors but had been sent by post to his country solicitor the failure to comply with the rule was treated by Kay J. as an irregularity capable of being cured.

For myself, except in cases covered by Order 52 rule 4, I see no reason to quarrel with the statement in the *Annual Practice* (1961, p. 1270) relating to motions in general that: "Affidavits may be filed up to the time of making the motion".

No doubt if affidavits are not filed and if copies are not supplied to the respondent a reasonable time in advance there may be a question of an adjournment and there may be a question of paying the usual forensic penalty in the way of costs. That, however, is entirely a different point.

Rule 13(1) of Order 59 makes it clear that the grounds of appeal must be set out in the motion itself. The affidavit mentioned in the rule which in the discretion of the Court may be supplemented at the hearing by oral evidence is the evidence on which the Court is to be asked to consider the grounds of appeal which have been set out. Such is clearly the view of the

English Courts regarding Order 59 rule 38 of the English Rules (see *Stock* v. *Central Midwives Board*[3] and *Allender* v. *Council of the Royal College of Veterinary Surgeons*[4]).

What section 44 of the Town Boards Enactment requires is that the appeal shall be "commenced" within 15 days. That is the condition that must be fulfilled and if within 15 days a notice is filed setting out the grounds of appeal then in my view both the letter and the spirit of the condition are fulfilled. As I had occasion to observe in the case of *Rembha Bai & Ors.* v. *Jasani*[5] :—

> "Public policy demands that a successful litigant should have notice within the time prescribed by law that his position may be challenged."

There is one other point which, although not a great deal was made of it before us, should be mentioned. Sub-section (iv) of section 44 provides that :—

> "Every such appeal shall be heard before the Court of a Judge and the decision of such Court shall be final and conclusive."

Here what is meant by the "decision" of the Court is clearly a decision of the issues raised by the appeal after the appeal has been heard. It has no application to a case like the present where in effect, whatever be the exact wording of the formal order that was drawn up, the appeal was not heard and was not decided.

I would allow the present appeal with costs and set aside the order of the High Court of 14th November, 1960.

Good J.A.: I have had the advantage of reading the judgment of the learned Chief Justice with which I am in complete agreement. For the same reasons as those which he has given, I too would allow the appeal with costs.

Ismail Khan J.: I have had the advantage of reading the judgment prepared by My Lord the Chief Justice. I am in agreement with the views expressed therein and have nothing to add.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Braddell & Ramani.*

LEE SHIP v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill J.A. and Rigby J.) November 5, 1960]

[J.B. — F.M. Criminal Appeal No. 12 of 1960]

Criminal Procedure — Police investigation — "Meddling" with bicycle lamp — Whether a "statement" made in the course of police investigation — Criminal Procedure Code (Cap. 6), s.113.

Gaming — Duplicate copy book of staking slips in characters lottery falling from bicycle lamp on "meddling" by accused at police station.

In this case the appellant was apprehended by two police constables and was taken to the Police Station. On his way to the Police Station or at the Police Station itself, the appellant was seen by the police constables to meddle with his bicycle lamp and a duplicate copy book of staking slips relating to a 10,000 characters lottery fell from it. The question for decision was "whether the evidence of the action of the appellant in 'meddling' with the bicycle lamp at the police station was evidence of a 'statement' made in the course of a police investigation."

Held: the evidence of the action of the accused in "meddling" with the bicycle lamp at the police station was not a "statement" made in the course of a police investigation.

COURT OF APPEAL (CRIMINAL).

R. Murugason for the appellant.

Pawan Ahmad (Deputy Public Prosecutor) for the respondent.

Rigby J.: This appeal comes before this Court by way of a reference under section 34 of the Courts Ordinance, 1948, that a point of law is involved which it is desirable in the public interest to have determined by the Court of Appeal. The particular point of law on which the opinion of this Court is sought, as set out in the Schedule to the Certificate, is :—

> "Whether the evidence of the action of the appellant in 'meddling' with the bicycle lamp at the police station was evidence of a 'statement' made in the course of a police investigation."

The appellant was charged under section 4(1)(c) of the Common Gaming Houses Ordinance in that at the time and date specified in the charge he was found at Main Road, Kulai, in the State of Johore, assisting in carrying on an illegal lottery, to wit, 10,000 characters lottery.

The main facts of the case were that at some time on the afternoon of 13th November, 1959, two police constables, acting on information received that same afternoon, apprehended the appellant in Main Road, Kulai, at the time he was found wheeling a bicycle. He was taken to the police station and it would appear, although the evidence is by no means clear on this point, that either on the steps leading to the police station or in the police station itself he was allegedly seen by the two police constables meddling with the lamp attached to the bicycle, and in the course of so meddling something fell from the lamp which, upon being picked up by the police constables, was found to be, and subsequently proved to be, the duplicate copy book of staking slips relating to a 10,000 characters lottery. The defence put forward was that this was a frame-up and the lottery book had been deliberately planted in the lamp by some person anxious to put the appellant into trouble. The appellant further alleged that he opened the front of the lamp at the request and instigation of one of the constables present and not of his own volition.

A number of points have been raised before us in the course of this appeal. It was first argued that the charge related to "carrying on an illegal lottery" whereas under section 4(1)(c) of the Common Gaming Houses Ordinance the particulars of the offence so described in that sub-section are :—

> "assists in carrying on a public lottery."